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IN THE

Supreme Court of the United States

October Term 1967
No. 378

P. S. O'REILLY, M.D.,

Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Petitioner wishes to present the following points in reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari:

I.

The Present Case Involves an Important and Substantial Federal Question.

Contrary to Respondent's assertion, Petitioner contends that the present case involves an extremely important and substantial Federal question. Unless the decision of the California Supreme Court construing the United States Information and Educational Exchange Act of 1948 is set aside, that decision will stand

as authority for the proposition that all *future* Federal Exchange Programs under successor statutes will be subject to the vicissitudes and uncertainties of state licensing laws and state licensing agencies in the 50 states and may be wholly defeated by state laws and regulations.

The California Supreme Court's decision declares that exchange visitors duly approved by the Secretary of State under the Federal statute can be rejected by the California Board of Medical Examiners for various reasons. This veto power over the admission of foreign exchange visitors will reside equally with any other licensing agency in any of the 50 states under the California decision. Henceforth, state licensing boards will have a veto power whenever the particular Exchange Program involves any activity which, in the absence of Federal legislation, falls within the ambit of any state agency's powers. The exercise of such powers by state agencies could seriously impair and frustrate the exercise of leadership and policy guidance by the Secretary of State, it could wholly defeat specific exchange programs, and it could embarrass the government of the United States in its relations with other nations. It is submitted that the Federal question thus presented is of sufficient substance and importance to merit this Court's consideration and decision.

II.

Respondent's Brief Is Predicated Upon the Erroneous Assumptions That (1) Congress Did Not Consider the Office of the Secretary of State to Be a Responsible and Qualified Reviewing Agency and (2) That Congress Wished to Subject the Secretary of State's Determinations to Possible Review and Veto by Various State Licensing Agencies in the 50 States.

Throughout its brief, Respondent asserts that Congress could not have intended to permit foreign visitors to perform medical functions (or any other functions) without "any responsible and qualified reviewing agency" first determining the applicant's fitness. (In example, see Resp. Br. pp. 2 and 8-9). Inasmuch as the statute expressly confers such powers upon the Secretary of State, Respondent is in effect saying that the Office of the Secretary of State of the United States Department of State is not a responsible and qualified reviewing agency.

Surely, no such lack of Congressional confidence can be found in the statute or in its legislative history. To the contrary, it is unequivocally clear that Congress in fact intended to and did confer broad powers upon the Secretary of State, subject only to further Congressional scrutiny, *not* the random and uncoordinated review and veto by licensing agencies in the various states.

Moreover, as a corollary contention, Respondent seems to argue at page 9 that, if Petitioner's interpretation of the statute is correct, unqualified persons (as deter-

mined by the state licensing agencies) will be permitted to engage in licenseable activities within a state, and no avenue will be open to review their qualifications. This assertion is incorrect. Under 22 C.F.R. Section 63.3(b) the Secretary of State may revoke and cancel any Exchange Visitor Program for sufficient cause, such causes including "failure to maintain educational standards as established by competent professional agencies; . . ." Thus, if a state licensing agency became aware of any marginal or substandard practice, it could petition the Secretary of State to revoke and cancel the Exchange Visitor Program involved and the Secretary, in his discretion, could do so. Of course, such, a course of conduct by a state agency would constitute recognition of the applicability of the doctrine of Federal Supremacy. This the California Board of Medical Examiners will not do, and this is the nub of the present controversy.

III.

Drs. Ohnishi and Sanchez Could Not Fulfill Their Exchange Visitor Programs Without Performing Medical Acts as Defined by California Law.

Respondent again suggests, as it did in the State Courts, that Drs. Ohnishi and Sanchez could have fulfilled all of their requirements under the Exchange Visitor Program without performing any medical functions as defined by California law. This assertion finds no support in the record, it is contrary to every reasonable implication which may be drawn from the facts,

and it was rejected by the California Supreme Court, which expressly recognized that the fulfillment of the Exchange Programs under which Drs. Ohnishi and Sanchez were admitted would require them to perform medical acts as defined by California law. In this regard, it is noted that Drs. Ohnishi and Sanchez were admitted for the purpose of receiving practical training "in traumatic and reconstructive surgery, with special emphasis on reconstruction of the hand and forearm."[1] Both Drs. Ohnishi and Sanchez were licensed medical doctors in their native countries, and Dr. Ohnishi was a professor of surgery at a Japanese university. Dr. Ohnishi was admitted to the United Statee for a period of 18 months and Dr. Sanchez for five years. It is absurd to suggest that they could fulfill their training expectations for such prolonged periods of time merely by observation, discussion and reading without performing any medical acts as defined by California law. Even *undergraduate* medical students perform medical functions in California (see California Business and Professions Code, Section 2147).

Conclusion.

Respondent's position, concurred in by the California Supreme Court, is that an instrument of United States foreign policy, the Exchange Visitor Programs under which Drs. Ohnishi and Sanchez came to the United States, may not be implemented in California without

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[1]In the Petition for Writ of Certiorari at page 8, the word "reconsideration" should be changed to "reconstruction."

first obtaining the discretionary approval of the California Board of Medical Examiners. It is respectfully submitted that this application of State Supremacy is contrary to the intention of Congress with reference to this statute, and that the proper determination of this question presents a substantial Federal question which vitally affects an area of United States foreign policy and which the Congress has declared to be of the utmost importance.

Respectfully submitted,

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